



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: FloorPro, Inc.

File: B-254854

Date: January 24, 1994

Betty J. Head for the protester.  
Beverly J. Burke, Department of the Treasury, for the agency.  
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where an invitation for bids for the application of epoxy to floors required bidders to submit certified test data showing that the epoxy they proposed to use had been tested for compliance with certain listed minimum specification requirements, a bidder which failed to submit with its bid test data addressing two of the requirements must be rejected as nonresponsive.

### DECISION

FloorPro, Inc. protests the award of a contract to Astro Painting & Carpentry, Inc. under invitation for bids (IFB) No. USM 93-36, issued by the Department of the Treasury, United States Mint, for the installation of self-leveling epoxy to resurface the floor of the Philadelphia Mint. FloorPro alleges that the Mint should have rejected Astro's low bid as nonresponsive.

We sustain the protest.

The IFB, issued on May 7, 1993, as a small business set-aside, contemplated the award of an indefinite quantity contract to restore the floor of the Philadelphia Mint with self-leveling epoxy. Section C.5.0 of the IFB, as amended, set forth 11 minimum requirements that the epoxy must satisfy, and the corresponding test procedures to be used in determining compliance with each minimum requirement.<sup>1</sup> Of relevance to this protest, the IFB required epoxy that could

<sup>1</sup>For most of the minimum requirements, the IFB prescribed an American Society of Testing and Material; for the others other test standards were prescribed.

sustain a particular degree of abrasion resistance (75 milligram weight loss) and impact resistance (16 foot pounds), as demonstrated through the applicable tests. Subsection L.14.D. of the IFB, in a section entitled "Submittal of Bids," stated:

"Each contractor shall submit with their bid manufacturer's data for all epoxy materials to be used, and shall use epoxy materials that conform to the testing methods and minimum requirements as stated in section [C.5.0.].<sup>2</sup> The technical information submitted with the bid shall be sufficient to determine acceptability of supplies or services offered."

Five bidders responded by the July 6 bid opening date. Of these, Astro submitted the apparent low bid at \$407,750, and FloorPro the next low bid at \$588,250.<sup>3</sup> In response to section L.14.D., these two bids included test data describing the epoxy to be used, with Astro proposing "Foxpack 1500" epoxy and FloorPro proposing "Dur-A-Glaze #4" epoxy. The agency evaluated the test data submitted by Astro for compliance with the IFB minimum requirements to determine whether Astro's bid was "responsive." Following this review of Astro's test data, the technical evaluator observed that:

"[t]wo physical property items, Abrasion Resistance and Impact Resistance, were not addressed and should be, for the epoxy material to meet [the IFB] requirements. Both parameters are important considerations concerning durability of the resurfacing."

Lacking test data for the Foxpack 1500 epoxy, the technical evaluator referred to tests performed on a different epoxy being used in a "test patch" on the floor of the Mint, which he acknowledged were less persuasive than data for the offered epoxy. He concluded that while it would be "preferable" to have the required Foxpack 1500 data, the data from the test patch epoxy was sufficient evidence of how the Foxpack 1500 might perform, such that "we can infer that the material is OK and safely accept the material as complying with the [specifications]." Notwithstanding this

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<sup>2</sup>The epoxy specification was originally listed at section C.6.0, but an amendment to the IFB redesignated this section as C.5.0.

<sup>3</sup>There was an intervening bidder between Astro and FloorPro, but it was disqualified for exceeding the small business size standard for this procurement.

conclusion, the evaluator cautioned that "we should ask for the data" on the Foxpack 1500 epoxy. Based upon this technical evaluation, the Mint determined that "the bid received from Astro is considered a 'GO' response," and made award to Astro on September 17 without requesting further data.

FloorPro argues that Astro's bid was nonresponsive because the bid failed to include test data verifying its product's compliance with all IFB minimum requirements. Absent this information, FloorPro asserts that the agency could not determine that the offered epoxy, Foxpack 1500, conformed to each IFB requirement. FloorPro states that, had it known that the agency was prepared to waive its minimum epoxy requirements, it would have offered "an inferior product costing less in price."

Where an IFB requires descriptive literature or certified test data to establish the offered product's conformance to the specifications, and bidders are so cautioned, a bid must be rejected as nonresponsive if the literature or data submitted fails to show that the offered product conforms to the specifications in the areas for which the literature was requested or shows that the product otherwise does not comply with the specifications. Federal Acquisition Regulation (FAR) § 14.202-5(d); National Window, Inc., B-251959, Apr. 16, 1993, 93-1 CPD ¶ 328. Here, while section L.14.D. required the submission of test data with the bid, it did not expressly state that the failure to provide adequate descriptive literature would result in the bid's rejection, as is required by FAR § 14.202-5(d)(1).

Where an IFB fails to disclose the purpose for the technical data, the extent to which it will affect the evaluation of bids, and the rules that will apply if the data does not comply with the IFB requirements or is not received by bid opening, a provision requiring technical data generally relates to bidder responsibility, rather than bid responsiveness. FAR § 14.202-5(d); Acoustic Sys., B-248373; B-248374, Aug. 24, 1992, 92-2 CPD ¶ 123; Commercial Window & Door Co., Inc., B-211280, Nov. 18, 1983, 83-2 CPD ¶ 582. Nevertheless, where the agency intends to use the descriptive data submitted with the bid to determine whether the offered item itself conforms to the IFB specifications and sufficiently alerts bidders to this intention through the IFB language, the submittal requirement properly is considered a matter of bid responsiveness, even if the IFB does not expressly identify the consequences of failing to submit the requested data. See Camar Corp., B-248485, Aug. 31, 1992, 92-2 CPD ¶ 140; Western Waterproofing Co., Inc., B-183155, May 20, 1975, 75-1 CPD ¶ 306.

Here, the test data requirement contained in the IFB clearly concerned bid responsiveness. The data required by the IFB--the test results quantifying the physical properties of the proposed epoxy--was said in the IFB to be necessary "to determine acceptability of supplies or services offered." The IFB did not require a specific epoxy, but established 11 test parameters for this critical product, with which the bidders had to show compliance in their bids. Thus, although the IFB did not state that the failure to furnish acceptable data would result in bid rejection, the IFB, when read as a whole, adequately alerted bidders to the agency's intention to impose a bid responsiveness requirement, and the record shows that the agency and the bidders so understood the requirement. See Camar Corp., supra. In particular, both Astro and FloorPro submitted test data for their proposed epoxy with their bids, and the agency evaluated the adequacy of the test data as a matter of bid responsiveness (i.e., the agency so labeled it and did not request further data from Astro after bid opening); indeed, no party has argued that the test data requirement related to a matter other than bid responsiveness. We therefore think that the agency properly regarded the adequacy of Astro's test data as a matter of bid responsiveness. Id.

As stated above, Astro's submitted data did not address two physical properties of its epoxy, abrasion resistance and impact resistance, which the IFB stated were minimum requirements. The Mint argues that the IFB did not require test data bearing upon each minimum requirement, but only enough data to demonstrate the product's acceptability, and that Astro's data, despite its omissions, met this standard.

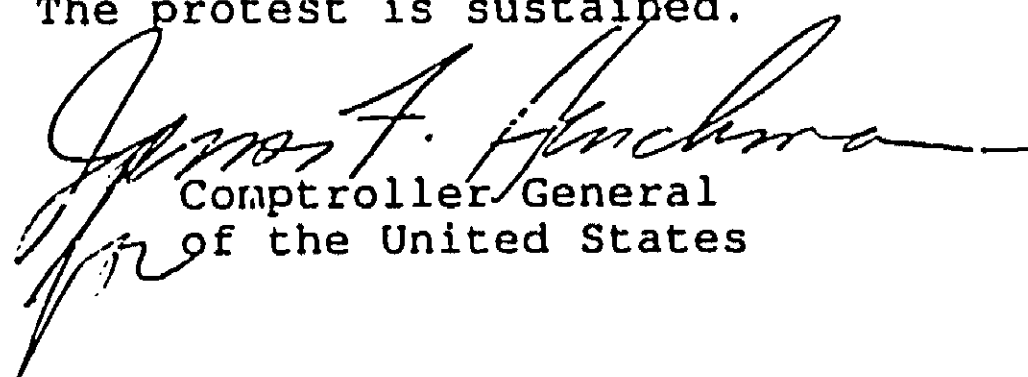
There is no evidence in the record to support the agency's contention that the epoxy's acceptability may be assumed without test data bearing upon these two minimum requirements. On the contrary, the agency's own technical evaluator stated that "[b]oth parameters are important considerations concerning durability of the resurfacing," which "were not addressed, and should be, for the epoxy material to meet [the IFB] requirements." The protestor also points out that the agency's reliance on data relating to a different epoxy being tested by the Mint is unreasonable since, at least with respect to abrasion resistance, the other epoxy does not meet the IFB requirements. Moreover, the protestor asserts that it has contacted the manufacturer of Foxpack 1500 and learned that there is no test data concerning abrasion and impact resistance--an assertion which the agency does not dispute.

We disagree with the Mint that the IFB did not require test data bearing upon each specified minimum requirement in order for the bid to be considered responsive. The IFB specifically conditioned the determination as to whether a

bidder's epoxy was acceptable upon the bidder's use of "epoxy materials that conform to the testing methods and minimum requirements as stated in [section C.5.0.]." Accordingly, since Astro's test data did not address the proposed epoxy's abrasion resistance and impact resistance, Astro's bid was nonresponsive and should not have been accepted for award. See Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247.

We recommend that the Mint terminate Astro's contract and make award to FloorPro, if otherwise proper. We also find that FloorPro is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees, 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f)(1), FloorPro's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the Mint within 60 days after receipt of this decision.

The protest is sustained.

  
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of the United States